



**AJJF OBSERVER MISSION REPORT
ON
THE HANDLING OF
KENYA'S 2022 PRESIDENTIAL
ELECTION PETITION
DECEMBER 2022**



DECEMBER 1, 2022

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Acknowledgements

This Mission was conducted with generous support from the Open Society Foundation. The Report was drafted with the help of Lucianna Thuo.



About Africa Judges and Jurists Forum

The Africa Judges & Jurists Forum (AJJF) is a pan-African network of judges and jurists,

who are committed to promoting the rule of law and development in Africa by providing legal expertise to governments, intergovernmental organizations, donor agencies, private sector and civil society organizations. Its Board is led by Justice Moses Chinhengo who is currently Acting Justice of the Court of Appeal of Lesotho, and its Judicial Elders Council is led by Dr Willy Mutunga, who is the Former Chief Justice of the Republic of Kenya. The Secretariat is led by Mr Martin Masiga, who is the Secretary General.

1. Executive Summary

In August 2022, the Africa Judges and Jurists Forum deployed a high level observer mission to monitor and observe the proceedings at the Supreme Court of Kenya on the determination of the 2022 presidential election petition. The purpose of overserving these proceedings was for the Mission to assess whether these proceedings were being handled in a manner that adheres to regional and global standards relevant for the handling of election disputes. In particular, the Observer Mission sought to assess whether the Supreme Court handled the proceedings in a manner which adheres to the right to fair hearing for the parties involved in the petition. The Observer Mission did not examine the election process itself, but only confined its review to the manner in which the Supreme Court handled proceedings concerning the hearing and determination of the presidential election petition. The Mission did not evaluate the evidence before the Court or assess the application of jurisprudence by the Supreme Court in that petition, as its mandate was limited to assessing the conformity of the proceedings to fair trial standards, irrespective of the outcome of the case. The Mission found that the Supreme Court complied with all the relevant regional and international standards on the right to fair hearing.

2. Introduction

The Africa Judges and Jurists Forum (AJJF) deployed an Observer Mission comprising of eminent African jurists, to observe the hearing by the Supreme Court of Kenya, of the 2022 presidential election petition. The Observer Mission arrived in Nairobi on 28 August 2022 and completed its mission on 4 September 2022. Headed by Retired Chief Justice of the Republic of Tanzania Mohammed Chande Othman, the Observer Mission comprised of Justice Henry Boissie Mbha of the Supreme Court of Appeal and immediate past President of the Electoral Court of South Africa; Justice Moses Chinhengo, AJJF Chairperson and Acting Justice of the Court of Appeal of Lesotho and former Judge of the High Court of Zimbabwe and of Botswana; Lady Justice Lillian Tibatemwa-Ekirikubinza of the Supreme Court of Uganda; and Lady Justice Ivy Kamanga of the Supreme Court of Appeal of Malawi.

The purpose of the Observer Mission was to monitor the proceedings before the Supreme Court of Kenya and assess whether these proceedings were being handled in a manner that adheres to

regional and global standards relevant for the handling of election disputes. In particular, the Observer Mission sought to assess whether the Supreme Court handled the proceedings in a manner which adheres to the right to fair hearing for the parties involved in the petition. The Observer Mission did not examine the election process itself, but only confined its review to the manner in which the Supreme Court handled proceedings concerning the hearing and determination of the presidential election petition. The Mission did not evaluate the evidence before the Court or assess the application of jurisprudence by the Supreme Court in that petition, as its mandate was limited to assessing the conformity of the proceedings to fair trial standards, irrespective of the outcome of the case.

3. Methodology

In conducting its assessment, the Mission relied on a desktop study of the relevant documents including the relevant key regional and international legal conventions outlining the relevant legal norms and standards, the Constitution of Kenya, rules regulating the procedures of the Supreme Court and media articles on the 2022 Kenya election. In addition, the Mission conducted several meetings with stakeholders. Notably, the Mission met with one of the petitioners, Mr. Raila Amolo Odinga, and one of the Respondents, Mr William Samoei Ruto. The Mission also met with the Law Society of Kenya (LSK), who were admitted as *amicus curiae*, former Chief Justices of Kenya, Mr. Willy Mutunga and Mr. David Maraga. The purpose of these meetings was for the Mission to better understand the context within which the proceedings were being held by the Supreme Court and to identify concerns from stakeholders which the Mission could take into account when observing and assessing the proceedings at the Supreme Court. Below are pictures of some of the meetings held by the Mission.



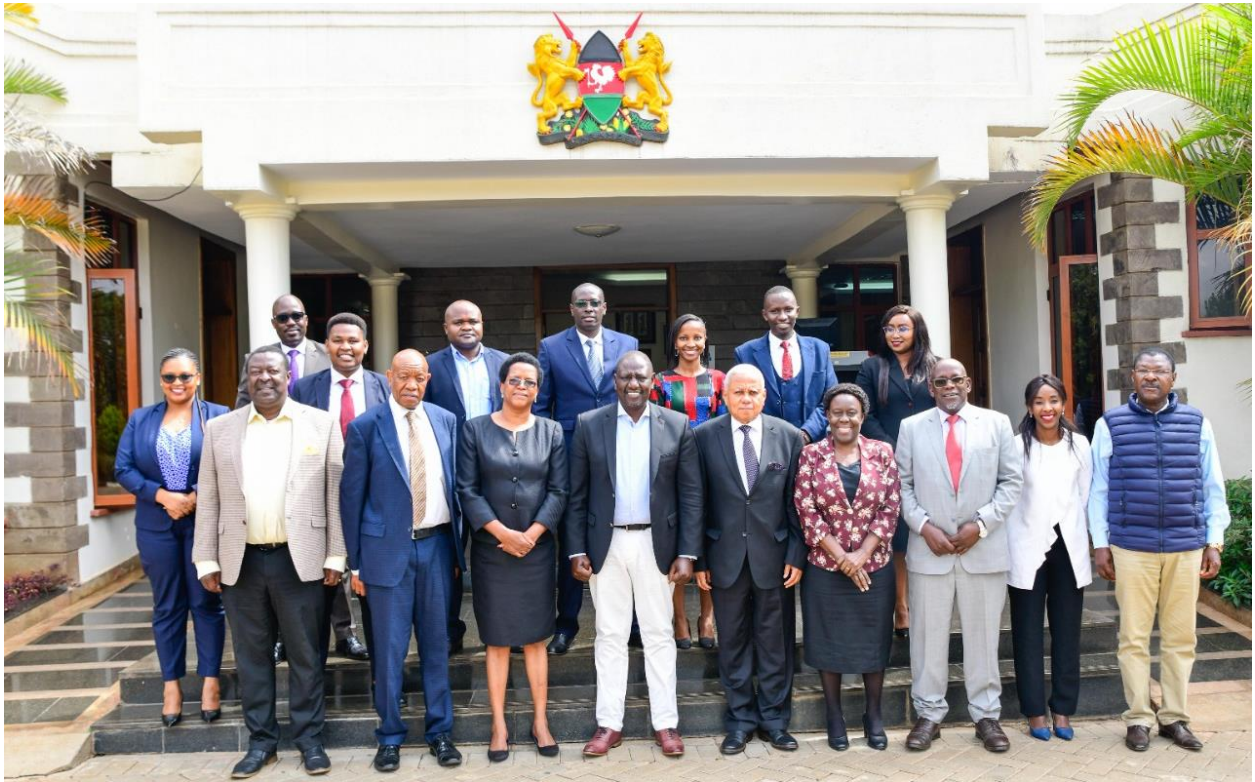
Dinner with Rtd Chief Justice Willy M. Mutunga, Rtd Chief Justice David K. Maraga, ICJ-Kenya Council and other representatives of civil society.



Members of the mission with the President of the Law Society of Kenya, Eric Theuri (2nd left) and CEO Florence Muturi (far right).



Meeting with President-elect His Excellency William Samoei Ruto



Members of the mission and ICJ-Kenya staff at meeting with President-elect joined by Hon Musalia Mudavadi - Chief Minister designate- (second left) and Hon Moses Wetangula - Speaker of the National Assembly nominee- (far right).



Meeting with Right Honourable Raila Odinga, the presidential candidate for the Azimio la Umoja Coalition.



Meeting with Meeting with Right Honourable Raila Odinga, the presidential candidate for the Azimio la Umoja Coalition. Here he is joined by Hon Jeremiah Kioni (2nd left).

4. Relevant international and regional standards on the right to fair hearing

The main international and regional instruments which guarantee the right to a fair hearing are the Universal Declaration of Human Rights,¹ the International Covenant on Civil and Political Rights (ICCPR)² and the African Charter on Human and Peoples' Rights.³ Elements of the right to a fair hearing in respect of resolution of election disputes are also protected in the African Charter on Democracy, Elections and Governance (ACDEG).⁴ Kenya has signed and ratified these instruments. Relevant to the handling of election disputes, the right to fair hearing includes the

¹ Arts 8 & 10.

² Art 14.

³ Art 7 as read with Art 21.

⁴ Art 17 (2).

following key elements: the right to access an independent tribunal; the right to legal representation; the right to be treated equally before the court and law; the right to prepare and present a case and defense; the right to a public hearing; the right to an expeditious hearing and the right to be given adequate reasons for the decisions made by the tribunal.

a. The right to access an independent tribunal established by law

Every person is entitled to a fair and public hearing by an independent and impartial tribunal.⁵ In relation to elections, the African Charter on Democracy, Elections and Governance (ACDEG) obliges states parties to establish and strengthen independent national mechanisms that redress election-related disputes in a timely manner.⁶ Such mechanisms must include independent tribunals that are established for purposes of hearing and determining election related disputes. As stated by the United Nations Human Rights Committee,⁷ the court (tribunal) must be institutionally independent from other arms of government, and the presiding judicial officers must be guaranteed with and exercise independence and impartiality when they hear and determine legal disputes.⁸ This principle has been underscored by the African Commission on Human and People's Rights in the AU Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (AU Principles),⁹ as well as in a number of cases which include *Civil Liberties Organization v Nigeria*¹⁰ and *Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo*.¹¹ This is also underscored in soft law human rights instruments, including the Bangalore Principles of Judicial Conduct and the Commonwealth (Latimer House) Principles on the three branches of Government.

Independence of judges is guaranteed to ensure that judicial officers determine legal disputes impartially, without fear or favour. As was noted by the United Nations Human Rights Committee in *Karttunen v. Finland*:¹²

⁵ Articles 8 and 10 of UN Universal Declaration on Human Rights

⁶ Art 17 (2)

⁷ See General Comment No. 32, para 18.

⁸ See Article 26 of the African Charter.

⁹ See Principle 1.

¹⁰ Communication No. 129/94.

¹¹ Communication 281 of 2003.

¹² Communication No. 387/1989.

“The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.”¹³

Fairness of proceedings fundamentally entails the absence of any direct or indirect influence, pressure or intimidation or intrusion upon the mandate of the judges.¹⁴

b. The right to a public hearing

This right is guaranteed in article 14(1) of the ICCPR which states that everyone is entitled to a ‘fair and public hearing by a legally constituted competent, independent and impartial judicial body.’ It is also an implied element of the right to fair hearing which is guaranteed under article 7 of the African Charter.¹⁵ The right to a public hearing entails the right of a party to a legal case to have his or her legal dispute adjudicated by the court through a hearing that is conducted in public. The UN Human Rights Committee has noted in General Comment 32¹⁶ that, for the hearing to be public, members of the public and the media must be permitted to access the court room and witness the court proceedings. In *Van Meurs v. The Netherlands*,¹⁷ the UN Human Rights Committee noted that:

“The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.”¹⁸

¹³ Ibid at at para 7.2

¹⁴ UN Human Rights Committee, Communication No. 770/1997, Gridin v. Russian Federation, para. 8.2.

¹⁵ See AU Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph A (3)

¹⁶ See paragraph 29.

¹⁷ Communication No. 215/1986

¹⁸ Ibid para. 6.2

The African Commission has also taken a similar position to the effect that the right to public hearings implies that the court hearing must be open to the public, including the media.¹⁹ However, as noted by both the UN Human Rights Committee and the African Commission,²⁰ courts are permitted to impose restrictions which limit the public or the media from accessing the court room during the hearing, and these restrictions may be imposed (i) in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence (ii) for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law. For example, due to space limitations, the court may limit the number of members of the public and the media who can attend proceedings. In order to protect public health, during pandemics (such as COVID-19) courts may also restrict the public and the media from physically accessing the court room where the proceedings are conducted. However, it is critical for the court to find other ways of enabling the public and the media to witness the proceedings as they happen, without needing to physically be in the court room. All the necessary information about the court proceedings and their scheduling must be made available to the public and the media.²¹

c. Right to equality before the court and law

Under article 14 (1) of the ICCPR, everyone is entitled to equal treatment before courts.²² This must be read together with article 26 [of the ICCPR] which guarantees the right to equal protection and benefit of the law. Similarly, article 3 of the African Charter guarantees the right to equality and equal protection of the law. Both the United Nations Human Rights Committee²³ and the African Commission²⁴ have noted that this right is an integral element of the right to fair hearing. The African Commission has emphasised that the right to a fair hearing entail:

“Equality of arms between the parties to proceedings [and] equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin,

¹⁹ See AU Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph A (3)

²⁰ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph A (3)(f)

²¹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph A (3)(a).

²² Art 14 ICCPR.

²³ See General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 2007.

²⁴ See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances”²⁵

No party should be accorded an advantage which is not given to the other parties.²⁶ In practice this entails, as was noted by the UN Human Rights Committee in *Dudko v. Australia*,²⁷ that all parties must be accorded the same procedural rights, unless justifiable distinctions based on law and objective and reasonable grounds can be demonstrated.²⁸

d. Right to adequate opportunity to prepare, present and challenge evidence

Article 14 (3) (b) of the ICCPR guarantees the right to be given adequate time to prepare for a case, present arguments before the court and challenge evidence. In the context of a criminal trial, the African Commission²⁹ has noted that the “accused person has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case.” Although this was noted in reference to criminal proceedings, there is no reason why the same should not be applied in the context of the right to fair hearing in civil cases. However, amongst factors which may affect the adequacy of time for preparation of a case or defence include the length of time prescribed by rules of procedure prior to particular proceedings. For example, the Kenyan Constitution prescribes that

“A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election. (2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.”³⁰

²⁵ See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para A (2)(a-b)

²⁶ General Comment No. 32, para 13.

²⁷ Communication No. 1347/2005, at para 7.4

²⁸ See Principle A (2) (c), AU Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

²⁹ At para N (3) (C) of *Ibid*

³⁰ Article 140(1) and (2) of the Constitution of Kenya

e. The right to an expeditious hearing

The right to a fair hearing entail that the legal dispute must be resolved by the court without delay.³¹ In addition, the court must deliver a judgment supported by reasons within a reasonable time. As has been noted by both the UN Human Rights Council³² and the African Commission,³³ the reasonableness of the time spent by the court to finalise the hearing and deliver a judgement is dependent on the complexities of the facts in each case, amongst other factors. In order to ensure resolution of legal disputes within reasonable time, some jurisdictions have adopted laws and policies which stipulate timeframes within which certain types of legal disputes must be finalised and judgements must be delivered. For example, in Kenya, decisions of the court in a presidential election petition must be handed down within 14 days after filing of the petition.³⁴

f. The right to legal counsel of choice

Both the ICCPR³⁵ and the African Charter³⁶ guarantee the right of every person to legal counsel of choice, as part of the right to fair hearing. The African Commission has noted that states parties to the African Charter are obliged under article 7 of the Charter to ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar.³⁷ The party must be permitted to consult with his or her legal counsel throughout the proceedings.³⁸ This will ensure that the party get timely

³¹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph A (2) (i).

³² See Communication No. 818/1998, *Sextus v Trinidad and Tobago*, para. 7.2 ; Communication No. 537/1993, *Kelly v. Jamaica*, para. 5.11; Communication No. 676/1996, *Yasseen and Thomas v. Guyana*, para. 7.11 and Communication No. 938/2000, *Siewpersaud, Sukhram, and Persaud v. Trinidad v Tobago*, para. 6.2

³³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph, at paragraph O(n) (iv)

³⁴ Article 140(1) and (2) of the Constitution of Kenya

³⁵ Art 14 (3) (d).

³⁶ As interpreted by the African Commission. See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph A (2) f.

³⁷ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at paragraph, at paragraph G(b)

³⁸ *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria* ACHPR, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000. Also see UN Human Rights Committee Communication No. 838/1998, *Hendricks v. Guyana*, para. 6.4 and UN Human Rights Committee Communication No. 775/1997, *Brown v. Jamaica*, para. 6.6.

assistance and advice on how best to advance their legal case and protect their rights during the proceedings.

5. Mission Observations

a. The right to consult and be represented by counsel of one's choice

The right of each party to legal representation was fully respected and honoured as each party was allowed to appoint and be represented by legal counsel of choice. However, due to the limited space available, restrictions were imposed on the number of legal counsels who could sit with the parties in the main court room. The Court issued directions stipulating the number of legal counsels who would be permitted to sit in the main court room. Each party was allocated an equal number of lawyers who could sit and consult with the parties in the main court room, while the rest of the legal counsels were allocated an overflow court room. These restrictions on the number of legal counsel who could sit in the main court room were consistent with article 14 of the ICCPR and article 7 of the African Charter which permit restricted access to the court room in the interests of orderly administration of justice.³⁹ The fact that each party was allocated equal number of legal counsels who could sit in the main court room is consistent with the right of parties to be treated equally before the court in line with articles 14 of the ICCPR and 3 of the African Charter.

b. The right to a public hearing

The right of the parties to have the election petition adjudicated through a public hearing was respected and honoured. Due to limited space available in the court room, only the parties, accredited media and legal counsel were permitted to physically attend the court proceedings. However, adequate measures were undertaken to ensure that the hearing would be conducted in

³⁹ See also General Comment 32, para 29 which stipulates: ‘Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public,

full view of the public. For instance, the proceedings were broadcasted on various radio and television stations with national and international coverage. They were also livestreamed on various social media platforms, including Facebook, You Tube and Twitter. The Supreme Court provided a detailed schedule outlining the dates and times during which the various proceedings were to be held, and this enabled the public and the media to follow the proceedings using various online and broadcasting channels. Therefore, although the public could not access the court room physically, they were able to follow the proceedings and thus, the hearings were conducted in full view of the public in compliance with article 14 of the ICCPR and article 7 of the African Charter.

c. Right to equality before the law

In terms of article 14(1) of the ICCPR and article 3 of the African Charter, parties must be treated equally before the court. This right was respected by the Supreme Court. After filing their written submissions, each party was given an opportunity to make their oral submissions and to respond during the hearings. The Court set aside three days for the hearing. A full day was allocated to the petitioners to make their oral submissions while another full day was allocated to the respondents. The third day was dedicated for rejoinders. Throughout the hearing, the Mission observed that judges sufficiently engaged with each party's submissions. Restrictions on the number of legal counsels who could sit in the main room were equally applied on the parties as each party was allocated an equal number of legal counsels who could sit in the main court room.

However, the Mission noted that the legal framework does not accord equal time for Petitioners and Respondents to prepare and file their initial submissions. While the petitioners have seven days from the date of declaration of the result to file a petition, the respondents [and *amici*] have only four days to file their responses.⁴⁰ Therefore, the petitioners have more time to prepare their initial submissions while the respondent shave less time. This undermines the principle that all parties must be treated equally, including being given equal opportunity to prepare and present their cases. However, this is an issue which cannot be addressed by the Supreme Court. It is the

⁴⁰ See Art 140 (1), Constitution of Kenya.

mandate of the legislature to relook into this and assess if there is a need to amend the legal framework to ensure that petitioners and respondents have equal time to prepare and present their initial submissions.

d. Right to access an independent tribunal established by law

The right of the parties to have their legal dispute resolved by an independent tribunal established by law was respected, as is required under article 14 of the ICCPR and article 7 of the African Charter. Article 140(1) of the Constitution of Kenya mandates the Supreme Court to hear and decide petitions challenging the results of presidential elections. The petitioners in the 2022 case filed their petition before the Supreme Court, and their petition was heard and decided by the judges of the Supreme Court.

The Mission did not observe anything which suggests subversion of the independence of the judges who presided over the petition. The Mission noted reports (carried mainly on social media) suggesting that some of the judges had resigned or had been compromised by parties to the case.⁴¹ However, none of these reports have been substantiated. The Mission also observed that the judges conducted themselves impartially. While delivering the summary judgment, the Deputy Chief Justice indicated that some of the parties had made attempts to meet the judges prior to the delivery of the judgment. The judges declined those requests, in order to safeguard their independence and to maintain public confidence in the independence of the Court.⁴²

e. Right to adequate opportunity to prepare, present and challenge evidence

All the parties were given an opportunity to file their written as well as make oral submissions during the hearing. They were given an opportunity to respond to arguments made by the opposing parties and challenge the evidence adduced. However, the Mission noted that the Constitution sets

⁴¹ ‘Judiciary Warns of Sponsored Social Media Attacks on Supreme Court Judges’ <https://www.citizen.digital/news/judiciary-warns-of-sponsored-social-media-attacks-on-supreme-court-judges-n305511> (accessed 5 November 2022).

⁴² [DCJ Mwilu Reveals How Several Attorneys Attempted To Call Before Court Ruling - Opera News](#) (accessed 6 November 2022), see Principle A (5) AU Principles on Fair Trial and Legal Assistance in Africa, 2003.

a strict timeframe within which the proceedings must be concluded, and the petition be determined. Article 140 (2) of the Constitution stipulates that “Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.” This timeframe may not be enough to give the parties adequate time to prepare their cases and responses. However, this is an issue which cannot be addressed by the Supreme Court. It is the mandate of the legislature to relook into this and assess if there is a need to amend the legal framework and provide for a longer timeframe.

f. Right to an expeditious hearing

Under article 14 of the ICCPR and article 7 of the African Charter, parties have a right to have their legal dispute determined by an independent court within a reasonable time and to be given reasons for the decision(s) made by the court. This right was fully respected by the Supreme Court of Kenya. The Court conducted hearings and delivered its judgement within 14 days as stipulated in article 140(2) of the Constitution, and thus there were no delays. The Court dismissed the application and delivered a summary judgement which outlines reasons for its verdict. The Court delivered its full judgment on 26 September 2022.



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